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SUPREME COURT, U.S.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-328

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ROGER BELTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent ROGER BELTON moves the Court for an order permitting him to proceed in this Court in forma pauperis, with his response to the petition for a writ of certiorari to the Court of Appeals of the State of New York, which judgment was entered on June 5, 1980, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said respondent.

Respondent's brief in opposition to the petition for a writ of certiorari is being filed with this motion and respondent's affidavit.

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ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
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To:

JAMES R. HARVEY, ESQ.
District Attorney, Ontario County
Attorney for Petitioner
Ontario County Courthouse
Canandaigua, New York 14424

In The

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF ERIE) SS.
CITY OF BUFFALO)

1. I, ROGER BELTON, being first duly sworn, depose and say that I am the respondent in the above entitled case; that in support of my motion to proceed in response to the petition for a writ of certiorari filed by the Ontario County (New York) District Attorney's office without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding, including the printing of the attached brief in opposition to the petition for writ of certiorari; that I believe that I am entitled to so respond to this petition for a writ of certiorari.

2. I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to the petition are true.

(a) I am not presently employed, having been laid off from my job at the Durez Division of Hooker Chemical Company in December, 1978. My monthly income from that job was approximately $1,000 (I worked there less than one year). I am

receiving public assistance.

(b) I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

(c) The total value of my cash, checking, and savings accounts is $.00.

(d) I do not own any real estate, stocks, bonds, notes, automobiles or other valuable property.

(e) My wife Karen is dependent upon me for support.

3. On or about October 8, 1979 I moved in the New York Court of Appeals for an order permitting me to maintain my appeal as a poor person and file seven (7) copies of the record on appeal and seven (7) copies of the brief instead of the twenty (20) copies required by the Rules of that Court. On October 23, 1979 the Court of Appeals granted my motion and ordered that my appeal could be prosecuted upon ten (10) copies each of the record on appeal and the brief. These papers were reproduced in the least expensive way possible.

4. I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Roger Belton
ROGER BELTON

Sworn to before me this
25th day of September, 1980.

Marie LaRue

[illegible] 81

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vs.

ROGER BELTON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

LIPSITZ, GREEN, FAHRINGER,
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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Respondent ROGER BELTON prays that a writ of certiorari to review the judgment of the New York Court of Appeals entered on June 5, 1980 be denied.

Opinion Below

The opinion of the New York Court of Appeals dated June 5, 1980 is reported at 50 N.Y.2d 447 (1980) and is printed in the Appendix to the petition at p. A-1 et seq. The opinion of the Appellate Division, Fourth Judicial Department, which was reversed by the Court of Appeals decision, is found at 68 A.D.2d 198 (4th Dept. 1978) and is reprinted in the Appendix at p. A-13 et seq.

Jurisdiction

Following the denial of respondent's motion to suppress, he pleaded guilty on September 29, 1978 in the Ontario County (New York) Court to attempted criminal possession of a controlled substance in the sixth degree in violations of Sections 110.00 and 220.06 of the New York Penal Law.

Respondent appealed as of right (New York Criminal Procedure Law § 710.70[2]) to the Appellate Division, Fourth Judicial Department. On May 22, 1979 that court unanimously affirmed the conviction. An application for leave to appeal to the New York Court of Appeals was granted by the Honorable Matthew J. Jasen, an Associate Judge of the Court of Appeals. On June 5, 1980 that court reversed the order of the Appellate Division, granted the motion to suppress, and dismissed the indictment.

A petition for a writ of certiorari was served upon respondent on August 30, 1980. The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3). This brief in opposition to the petition is filed within thirty days after receipt of the petition, pursuant to Rule 22(1) of the Supreme Court Rules.

Constitutional Provisions Involved

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

New York Criminal Procedure Law § 710.70(2) Motion to suppress evidence; orders of suppression; effects of orders and of failure to make motion.

An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

Question Presented

1. Whether the warrantless search of respondent's zippered jacket in the absence of exigent circumstances while it was within the exclusive control of the police, and the seizure of contraband from its recesses violates the Fourth and Fourteenth Amendments, requiring that the evidence be suppressed and the indictment dismissed.

Statement of Facts

On April 9, 1978, respondent and three companions, all of whom were from Buffalo, were travelling west on the New York State Thruway. A State Trooper, Douglas Nicot, estimated the vehicle was travelling at approximately 75 miles per hour in 55 mile per hour zone and accordingly motioned the automobile over to the shoulder of the road to arrest the driver for a speeding violation. The driver rolled down his window and complied with the trooper's request for his license and registration. Upon examining the registration, the trooper discovered that the car was not owned by any of the four individuals but was registered to an unrelated woman in Buffalo, and the license produced by the driver was not his own. Respondent was seated in the rear seat behind the driver.

Having smelled the odor of burning marijuana emanating from inside the stopped vehicle, the trooper concluded that the individuals were unlawfully in possession of marijuana and placed them under arrest and commanded them to exit from the car. As the four men got out of the vehicle, the officer placed them a short distance apart from each other and conducted a pat down search for weapons. Even though the defendants were in custody and the officer was assured as the result of his search that he had no reason to fear any physical violence through the use of a concealed weapon, he entered the car and conducted a further search. He seized a manilla envelope, stamped "super gold", from the floor of the vehicle. A minute quantity of marijuana residue was found inside.

After some butted marijuana cigarettes were discovered in the ashtray, the trooper formally arrested the defendants, read them their Miranda rights, and again searched each of them thoroughly for further evidence. Despite the fact that "[t]he car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent" (50 N.Y.2d at 452), the trooper re-entered the dormant vehicle and conducted a further intensive search of its contents, particularly an item of personal clothing found on the back seat.

Lying in the middle of the back seat was a black leather jacket with four or six pockets. None of the defendants was within any reach of the jacket nor was there any indication that this personal item of clothing contained a concealed weapon. The trooper conducted a pat down search of the jacket and felt no dangerous instrument hidden inside. Holding the jacket in one hand and thus reducing it to his exclusive possession, he nevertheless

unzipped and/or opened all of the pockets. In one of the recesses was found two marijuana cigarettes. In a zippered pocket the trooper discovered a twenty dollar bill which, when unfolded, yielded a small quantity of white powder. The warrantless examination of the jacket also produced a plastic bag containing white powder. In one of the pockets was a personal medical insurance card bearing respondent's name. None of these seized items was visible until the trooper opened the pockets. Throughout this entire illegal search and seizure, the defendants were outside of the vehicle, unarmed and within the control and custody of an armed and trained New York State trooper. Based upon his findings, Trooper Nicot arrested all four defendants for illegal possession of suspected cocaine. He radioed to the nearest state trooper barracks and requested that a magistrate be made immediately available for the arraignment. At no time in the trial court during the suppression hearing was there ever a claim by the trooper that his own personal safety was in jeopardy or that the defendants had been anything other than fully cooperative.

The four defendants and the jacket were swiftly transported to a town court and brought before a local town justice. Respondent was subsequently indicted on May 24, 1978 for criminal possession of a controlled substance in the fifth degree. No indictments were returned against his three companions. Upon the trial court's denial of respondent's motion to suppress the cocaine seized during the illegal search, respondent pleaded guilty to attempted criminal possession of a controlled substance in the sixth degree in violation of New York Penal Law.

An appeal was mounted to the Appellate Division, Fourth Judicial Department. On May 22, 1979 that court affirmed respondent's conviction and incorrectly held that the search of the

jacket found in the vehicle's back seat, outside of the reach of respondent or his companions, was justified as a search incident to arrest. On June 27, 1979 respondent's application for leave to appeal was granted by an associate judge of the New York Court of Appeals. In its opinion dated June 5, 1980 New York's court of last resort held that: "A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article" (A-5 of petition).

REASONS FOR DENYING THE WRIT

I

The warrantless search of respondent's zippered jacket in the absence of exigent circumstances while it was in the exclusive control of the police, and the seizure of contraband from its recesses violates the Fourth and Fourteenth Amendments, as properly found by New York State's highest court.

Petitioner maintains that the decision of the New York Court of Appeals is "in complete disharmony with the decisions of federal Courts of Appeals and state courts of last resort that have been confronted by similar factual situations" (Petition at 5). On the contrary, we are convinced that the Court of Appeals properly applied the rules governing a search incident to arrest and found that the search in the present case went beyond that which this Court has found permissible and went outside of the boundaries established by this Court in Chimel v. California, 395 U.S. 752 (1969). Furthermore, the New York court was guided in its decision by the principles set forth in United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979). Moreover, even a cursory review of the cases relied upon by petitioner in

which warrantless searches were upheld indicates that the factual situations are widely disparate.

Finally, petitioner would have this Court grant certiorari and reverse the order of the New York Court of Appeals based solely upon unsupported speculation that the arresting officer was in danger. There was no such finding in the trial court and thus petitioner is precluded from arguing facts which simply do not exist on the record of this case. Petitioner claims that the decision of the New York Court of Appeals in People v. Belton has caused "acute difficulties in advising police officers as to the limit of their legal authority under such circumstances" (Petition at 8). We respectfully submit that the New York Court of Appeals merely followed this Court's guidelines and that if police officers in the future act pursuant to such directives, there will be no problem for their own safety or for the Fourth Amendment privacy rights of potential defendants.

Correct Decision Below

In holding that the warrantless search of the zippered pockets of the unaccessible jacket was not a permissible search incident to a lawful arrest - since there was no danger that the defendant or his companions could reach the article - the Court of Appeals relied upon this Court's decisions in Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977). Specifically, the Court of Appeals stated:

> "That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. Defendant's

> arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest [citing Chadwick, supra and Sanders, supra]. The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station imminent. There was, therefore, no reason why the search should not have awaited the issuance of a warrant" (50 N.Y.2d at 452, 429 N.Y.S.2d at 577).

When the decision of the New York Court of Appeals is so clearly in line with this Court's rulings, there exists no reason whatsoever for this Court to grant the petition. Moreover, the cases cited by petitioner as being "in complete disharmony" are readily distinguishable on the facts from the instant case.

For example, in United States v. Wilkerson, 598 F.2d 621 (D.C. Cir. 1978), after the appellant passenger had alighted from the vehicle at the officer's request, the officer looked into the front passenger compartment where he noticed a coat in the front seat which appeared to be wrapped around something. The officer reached into the front seat and placed his hand on the coat, pressed it and felt something like a shotgun. Upon unwrapping the coat, the officer discovered a sawed-off shotgun. None of the passengers in Wilkerson, supra, had been frisked prior to the officer's arrest. Thus, in Wilkerson, supra, unlike in the present case, the officer felt the outside of the article before searching further. A similar situation existed in United States v. Foster,

584 F.2d 997 (D.C. Cir.), cert. denied, 99 S.Ct. 620 (1978), where a police officer arrested a driver in a parked car for a marijuana violation. The officer ordered the driver out of the car and patted him down. As he was doing so, he saw a folded grocery bag being passed from the front seat passenger to the two passengers in the back seat who proceeded to push it back and forth between them. These actions were conducted in a stealthy manner such that the officer believed the bag contained a weapon. Therefore, he felt the bag and determined by this sense that its contents included a soft object and something which he believed to be some type of weapon, thus justifying his opening of the bag. The New York Court of Appeals was not faced with a situation where the trooper had felt the outside of the jacket and determined that a weapon was inside one of the zippered pockets.* However, the record is clear that even after patting down the jacket and finding no evidence of a dangerous instrumentality, the trooper nevertheless opened the private recesses of this unaccessible item of personal clothing.

In United States v. Agostino, 608 F.2d 1035 (5th Cir. 1979), the court upheld the warrantless seizure of the cocaine because it was in plain view or, in the alternative, because it found that a defendant-driver could reach the floor of the front seat of the vehicle. Similarly, the search in United States v. Campbell, 575 F.2d 505 (5th Cir. 1978), was sustained because the court specifically found that the clothing was within the reach of the defendant such that he could have obtained a weapon to use against

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* The jacket, in the trooper's exclusive possession, however, would still be unreachable to the four defendants.

the arresting officer. In our case, there was no finding in the trial court that the jacket, lying in the middle of the back seat of a two-door vehicle, was accessible to any of the four defendants, all of whom were standing outside of the automobile, arrested, searched and in the custody of an armed state trooper. In fact, as the New York Court of Appeals' opinion notes, the jacket in this case was not accessible by petitioner or any of his confederates. Therefore, those cases cited by petitioner in a vain attempt to convince this Court that federal Courts of Appeals have decided the issue differently are simply not on point. In both United States v. Garcia, 605 F.2d 349 (7th Cir. 1979) and United States v. Ajlouny, 476 F.Supp. 995 (E.D.N.Y. 1979), the receptacle that was searched (e.g., a suitcase or a briefcase) were found to be ready to hand and within the immediate control of the defendant.

The state cases cited by petitioner for his untenable claim that the New York Court of Appeals incorrectly decided the present case are no more persuasive. For example, in State v. Hunter, 261 S.E.2d 189 (N.C. 1980), the police had probable cause to believe that the defendant had just committed the crime of rape at gun point. The court upheld the seizure of the weapon from under the front seat as a search incident to the defendant's arrest because it found that the area in the front seat was within his immediate control. Moreover, in Hunter, there existed proable cause to believe that a gun was present in the vehicle in which the defendant had allegedly just committed a violent crime. The situation of an alleged rapist whom the police had probable cause to believe was armed is vastly different from that presented by our case where respondent and his companions were arrested for possession for a quantity of marijuana so small it did not even amount to a crime.

In State v. Wilkens, 354 So.2d 934 (La. 1978), a syringe was discovered on the floor in the front of the driver's seat directly below where the defendant stood. Not only was this area within the "grabbable" range of the defendant, the syringe may be said to have been within the plain view of the officer. In our case, however, the discovery of the cocaine wihin the zippered pockets of a black leather jacket in the back seat of a car, while respondent and his confederates were outside of the vehicle, cannot be said to have been within the immediate area or in plain view. Accordingly, neither Hunter nor Wilkens present any authority for this Court to review the correct decision of the New York Court of Appeals.

Petitioner would have this Court set forth a precise formula to be applied to every unique factual situation. Thus, petitioner would want this Court to hold that no search incident to arrest and seizure of evidence from outside of the defendant's immediate area is illegal unless there were "x" number of police officers per "y" number of defendants, and "z" number of sets of handcuffs, etc. No such simple formula is possible, however, because every confrontation between a citizen and police is different. Therefore, the most that can be done is for the various state courts to follow the law set forth by this Court. The New York Court of Appeals did precisely that in arriving at the conclusion that the search was illegal. Because the Montana Supreme Court in State v. Cripps, 582 P.2d 312 (Mont. 1978) or the Louisiana Supreme Court in State v. Blanchard, 374 So.2d 1248 (La. 1978), came to slightly different conclusions, operating with different factual data, does not render the decision of the New York Court of Appeals incorrect. Every police/citizen encounter is different.

Thus, a review of the well-reasoned opinion by New York's highest court should be sufficient to convince this Court that the majority of the New York Court of Appeals properly applied the most recent body of Fourth Amendment law. We respectfully submit that to grant this petition would merely result in an unnecessary and repetitive statement of the law which is clear and was properly applied below.

Conclusion

For all these reasons, the Court should deny this petition for certiorari.

September 25, 1980

Respectfully submitted,

LIPSITZ, GREEN, FAHRINGER,
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Roger Belton

Sworn to before me this
25th day of September, 1980.

Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1981

80-378

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STATE OF NEW YORK)
COUNTY OF ERIE) SS.
CITY OF BUFFALO)

BARBARA M. HAGAN, being duly sworn, deposes and says, that on the 25th day of September, 1980, she served one copy of the within Motion to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari on James R. Harvey, Esq., District Attorney, Ontario County, by enclosing a true copy thereof in a securely sealed postage paid wrapper, and depositing the same in a Post Office box regularly maintained by the United States Postal Service at 65 Court Street, County of Erie, City of Buffalo, New York, directed to said James R. Harvey, Esq., District Attorney, Ontario County, Ontario County Courthouse, Canandaigua, New York, 14424, that being the address within the State designated by him for that purpose on the preceding papers in this action.

Barbara M. Hagan
BARBARA M. HAGAN

Sworn to before me this
25 day of September, 1980

Marie La Rocco